

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN STANLEY,

Plaintiff-Appellant,

v

COMERICA BANK,

Defendant-Appellee.

UNPUBLISHED

November 24, 1998

No. 203412

Wayne Circuit Court

LC No. 96-614752 CZ

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, a black woman, was hired by Manufacturer's Bank in 1983 and continued working for Manufacturer's Bank throughout its merger with Comerica Bank and eventually became supervisor in the domestic collections unit of Comerica Bank's trust operations division. Plaintiff supervised several clerks and she was supervised by Jill Nesbitt, a white woman, the manager of the unit. In 1994, plaintiff filed an internal grievance alleging that her merit increase to her salary was inadequate. The grievance was resolved in favor of plaintiff and she received the highest possible merit increase, retroactive to the date she received her initial merit increase.

Sometime thereafter, defendant decided that the domestic collections unit would be merged into another department. Consequently, plaintiff's position and two white clerical employees' positions were eliminated, effective January 1996. Nesbitt's position was also to be eliminated, but not until the remaining staff was transferred to the new department.

Defendant had a policy whereby employees whose jobs had been eliminated were permitted to bid on available jobs that are advertised within a department in defendant's "career mobility" postings. Defendant does not place employees in vacant positions or consider employees for positions for which they do not bid. Of the employees in the domestic collections unit whose positions were being eliminated, one of the clerical employees bid on four different positions and was selected for one of those positions; the other bid on at least two positions, but was not selected for either. Nesbitt also bid

on positions and was not selected. Plaintiff failed to bid on any positions, and consistent with defendant's practices, was not specifically guaranteed another position with defendant.

Near the time that defendant decided to eliminate plaintiff's unit, defendant also decided to eliminate its safekeeping unit. However, in order to ensure the smooth operation of that department, the employees of the safekeeping unit, which consisted of five black and four white employees, were guaranteed jobs with defendant without having to bid for them.

Plaintiff claimed that her termination was in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 17.428(1) *et seq.*, for three reasons. First, plaintiff claimed that she, a black woman supervisor, should have assisted with the transition of the domestic collection unit into a new department, not Nesbitt, a white woman manager. Second, plaintiff contended that after her position was eliminated, she should have been guaranteed another job as were the employees of the safekeeping unit. Finally, plaintiff argued that she was terminated in retaliation for filing an internal grievance regarding her merit increase.

Plaintiff contends that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because there were genuine issues of material fact. We disagree. This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court must review the trial court record to determine if the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). The initial burden of supporting a motion for summary disposition pursuant to MCR 2.116(C)(10) is on the moving party to specifically identify the matters that have no disputed factual issues by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Then, the party opposing summary disposition has the burden of showing that a genuine issue of material fact does exist through evidentiary material. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The existence of a disputed fact must be established by admissible evidence and, it is not sufficient to promise to offer factual support at trial to establish the existence of a disputed fact. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). All inferences are to be drawn in favor of the nonmoving party. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997).

Plaintiff first argues that the trial court erred in granting summary disposition regarding her racial discrimination claim. We disagree. In order to establish a claim of racial discrimination under the CRA, a plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Sisson v Bd of Regents of Univ of Michigan*, 174 Mich App 742, 746; 436 NW2d 747 (1989). In this case, plaintiff's discrimination claim is based on a theory of disparate treatment. To establish a prima facie case of discrimination in a disparate treatment case, plaintiff must show "(1) that [s]he was a member of the class entitled to protection under the act, and (2) that, for the same or similar conduct, [s]he was treated differently than one who was a member of a different race." *Id.* at 746-747.

In the present case, plaintiff, a black female, is a member of a protected class entitled to protection under the act. With respect to whether plaintiff was treated differently because of her race, plaintiff argues that defendant should have retained her instead of Nesbitt to facilitate the merger of the

two units. However, Nesbitt was already manager of the unit, and plaintiff was the supervisor. Because both women held different positions, they were not similarly situated. Therefore, after reviewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff failed to establish a prima facie case of racial discrimination based on disparate treatment because she and Nesbitt were not similarly situated.

Plaintiff also argues that because employees of the safekeeping unit, whose positions were also being eliminated, were promised positions, it was discrimination for defendant not to promise plaintiff a position. However, evidence was introduced that the racial composition of the employees of the safekeeping unit was more than fifty percent African-American. Therefore, plaintiff can not use the placement of those employees to show disparate treatment because plaintiff must show that she was treated differently than someone of another race, not of the same race. *Id.*

Plaintiff finally argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) regarding her retaliation claim. We disagree. The CRA prohibits employers from retaliating against employees because they “made a charge, filed a complaint, testified, assisted, or participated in an investigation proceeding, or hearing under this act.” MCL 37.2701; MSA 3.548(701); *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). To establish a prima facie case of unlawful retaliation, plaintiff must show “(1) that [s]he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Plaintiff filed an internal grievance with defendant alleging that she was entitled to a higher merit increase than the one she received. In that grievance there was no implied or express concern by plaintiff that her low merit increase was the result of discrimination. Further, no mention is made by plaintiff in her grievance of the racial composition of any employees who received the same merit raise as she did, or the racial composition of other employees who received higher increases. Plaintiff, in her grievance, did not raise the spectre of a discrimination complaint. Therefore, there is no genuine issue of material fact regarding whether plaintiff was engaged in protected activity when she filed her internal grievance. On the contrary, the record establishes that plaintiff was not engaged in a protected activity. Accordingly, the trial court properly granted defendant’s motion for summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage